

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

AMENTUM SERVICES, INC.,

Respondent.

and

ERIC DOWNS,

Charging Party.

Case No. 28-CA-276524

RESPONDENT AMENTUM SERVICES, INC.'S POST-HEARING BRIEF

Before Arthur J. Amchan, Administrative Law Judge

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AMENTUM SERVICES, INC.'S POST HEARING BRIEF

Administrative Law Judge Arthur J. Amchan conducted a hearing regarding Eric Downs' (the "Charging Party" or "Mr. Downs") unfair labor practice charge and the General Counsel's Complaint on March 29-30, 2022. As set forth in more detail below, the General Counsel failed to establish that Amentum Services, Inc. ("Amentum," "Company," or "Respondent") violated Sections 8(a)(1) and (a)(3) of the Act. The Complaint should be dismissed in its entirety.

SUMMARY OF ARGUMENT

The Complaint and evidence at the hearing concern several alleged violations of Section 8(a)(1) and Section 8(a)(3). All the alleged violations flow from a grievance settlement negotiated by Amentum and Teamsters Local 161 ("Union") over Amentum's selection of Josh Tully ("Mr. Tully") over Mr. Downs for the logistics extra duty assignment, and Mr. Downs' apparent dissatisfaction with the implementation of that settlement. Amentum selected Mr. Tully because he was the best qualified candidate, although he had less seniority than Mr. Downs. The dispute was whether Amentum had full discretion to assign the extra duty or whether the assignment was subject to the promotional bid requirements of the parties' CBA.

While Amentum did not agree that the assignment was subject to the promotional bid language of the CBA, in the spirit of compromise it agreed to resolve the grievance by assigning Mr. Downs to the extra duty. Amentum *did not* agree that it would remove Mr. Tully from the assignment, and the Union never requested that Mr. Downs be the only employee assigned to the extra duty. Indeed, the Union's business agent, Darrin Bradburn ("Mr. Bradburn") and Amentum's Director of Labor Relations, Connie Moore ("Ms. Moore") had resolved numerous grievances in the past that involved bumping another employee due to the reinstatement or transfer of a grievant. It is undisputed that the only term of the grievance settlement here was to assign

Mr. Downs the extra duty, but it is also extremely telling that bumping Mr. Tully was not even a topic of discussion between two extremely experienced labor relations professionals.

When Ms. Moore notified Functional Area Manager Quentin Mulholland (“Mr. Mulholland”) of the grievance settlement, Mr. Mulholland worked to implement it. He moved Mr. Downs to the location where the extra duty assignment was performed so that Mr. Downs could train with Mr. Tully. He requested vacation schedules from both employees with the idea that each employee would be assigned to a shift, and ideally the assignment would be least disruptive to that employee’s scheduled time off. Mr. Mulholland also considered that the B-shift had an additional resource in Mr. Shakespeare, a firefighter who had previously performed the extra duty assignment and would be able to assist whoever was assigned to that shift. Throughout this process, Mr. Mulholland communicated his intentions and the requirements of the extra duty assignment to Mr. Tully and Mr. Downs. He also spoke with Adam Sturn (“Mr. Sturn”), a union steward, and kept him abreast of developments.

The General Counsel did not present a single witness or document to substantiate the allegation that the use of two firefighters to perform the extra duty assignment violated the CBA or otherwise exceed Amentum’s management rights. The General Counsel also failed to present a single witness or document to substantiate the allegation that the use of two firefighters for the extra duty assignment violated the grievance settlement. Rather, the General Counsel attempted to characterize Amentum’s business decision to have both Mr. Tully and Mr. Downs work the assignment as retaliation against Mr. Downs. Aside from Mr. Downs’ dissatisfaction with having to share the assignment, the General Counsel solicited testimony that the previous firefighter who worked the extra duty assignment, Craig Cuzens (“Mr. Cuzens”), performed the assignment by himself and on a detached schedule. Amentum anticipates that the General Counsel will argue

that the fact one person did the assignment before means there was something improper about Amentum's decision to have two firefighters work the assignment. This is nonsensical and insufficient to establish a violation of Section 8(a)(3). Moreover, it is contrary to the undisputed facts and the testimony of Fire Chief Jeffrey Wilson ("Chief Wilson"), who has been at the work location for nearly 30 years, worked the extra duty assignment in 1997, and has seen two firefighters work in the role before. Moreover, any suggestion that Amentum's operational decisions were motivated by a retaliatory animus must be rejected by the undisputed fact that, after the grievance settlement, Mr. Mulholland worked to secure premium pay for Mr. Downs, and also corrected his timecard on April 29, 2021, to pay Mr. Down for *more* hours, not less.

The remainder of the General Counsel's case revolves around statements allegedly made by Mr. Mulholland and Assistant Fire Chief Philip Geary ("Mr. Geary") as Amentum's implementation of the grievance settlement progressed and Mr. Tully and Mr. Downs continued to train for the new assignment. The first series of so-called unlawful statements – allegedly made by Mr. Mulholland during an April 5th meeting– clearly did not violate the Act. This portion of the Complaint (Paragraph 5(e)) should be dismissed for three reasons:

- (1) Although the April 5th meeting was attended by no less than five people, no other witnesses corroborated Mr. Downs' claim that Mr. Mulholland stated: "he didn't have to tell them anything;" that Mr. Mulholland grew angry and asked, "who do you work for," and that Mr. Mulholland stated he was not "going to argue semantics" with Mr. Downs. Mr. Mulholland, Brett Tompkins ("Mr. Tompkins"), Mr. Geary, and Mr. Tully were present at the meeting. Each of them testified honestly and credibly.
- (2) Mr. Tompkins was a union steward for 12 years. He testified that Mr. Mulholland said nothing in the April 5, 2021 meeting that concerned him.
- (3) Finally, to the extent that any credit is given to Mr. Downs' testimony, the statements attributed to Mr. Mulholland do not violate the Act. They were non-disparaging and non-threatening. With regards to Mr. Mulholland's admitted statement to the effect that he did not have to run his personnel decisions by "Mikey," the union steward, this was merely a truthful statement of fact. Notably, neither Mr. Downs nor the Union filed a grievance or otherwise challenged Mr. Mulholland's authority to assign Mr. Downs

and Mr. Tully to separate shifts without first securing the agreement of the Union.

The General Counsel's next allegations, which are set forth in Complaint Paragraph 5(f) and (j)(2), are that Mr. Mulholland threatened employees on April 12, 2021 by inviting employees to quit and issued a verbal counseling to Mr. Downs. The General Counsel presented no evidence, not even testimony from Mr. Downs, that any statement regarding employees quitting was made on April 12. This allegation should be dismissed as it was not supported by any evidence. As to the verbal counseling, the undisputed evidence established that a verbal counseling is not considered disciplinary by Amentum, and certainly would not rise to the level of constituting an adverse action for purposes of establishing a violation of the Act. *See, e.g., Promedica Health Systems Inc.*, 343 NLRB 1351, 1351-1352 (2004) (quoting *Trover Clinic*, 280 NLRB 6, 16 (1986)); *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993); *Jochims v. NLRB*, 480 F.3d 1161, 1170-1171 (D.C. Cir. 2007).

The final series of unlawful statements alleged in the Complaint are set forth in Paragraphs 5(g) and 5(h). The General Counsel alleged that Mr. Mulholland and Mr. Geary threatened employees with discharge on April 29, 2021. These allegations should be dismissed for the following reasons:

- (1) They rely solely on Mr. Downs' testimony, which was contradicted by credible witnesses and not supported by witnesses that were available to the General Counsel.
- (2) The undisputed evidence established that Mr. Mulholland corrected Mr. Downs' April 29 timecard to pay him for 12 hours, rather than the 10 hours Mr. Downs had entered. Mr. Mulholland's actions to secure more hours, and more pay, for Mr. Downs render Mr. Downs' claims that Mr. Mulholland said he would not pay him to go downtown, and threatened discharge for doing so, incredible.
- (3) Finally, there was overwhelming evidence that accurate timekeeping practices were a frequent topic of discussion in the workplace, and that the one employee who had been caught committing timecard fraud was a cautionary tale in the workplace. Employees received annual training on timekeeping. Mr. Mulholland discussed the

importance of accurate timekeeping with Mr. Downs and Mr. Tully on several occasions, both in person and through email. Under the circumstances, Mr. Geary's and Mr. Mulholland's testimony regarding discussing timekeeping practices with Mr. Tully and Mr. Downs on April 29, 2021 in a neutral, non-threatening manner must be credited.

In summary, the record is unequivocal. The General Counsel's allegations have no merit. The Complaint should be dismissed in its entirety.

STATEMENT OF FACTS

A. Background Information about Amentum, the RSS2 Contract and the Provision of Fire Protection Services Under the Contract

Amentum is a contractor which provides services to the United States Air Force pursuant to the Range Support Services contract ("RSS2"). GC Exhibit 1(m); GC Exhibit 5. The services are performed throughout the Nellis Test and Training Range ("NTTR"). *Id.* The locations of the work performed and the details of Amentum's work at the NTTR are classified and tied to national security. *Id.* Every employee working on the contract must comply with strict confidentiality rules and obtain and maintain a security clearance. GC Exhibit 5, p. 5.

In essence, Amentum operated a turnkey fire department for the Air Force at certain locations at the NTTR. GC Exhibit 1(m); GC Exhibit 5. All of the persons who work at the location are required by the U.S. Government to be certified combat fire fighters qualified to perform all fire services work. GC Exhibit 5, p. 4. Direct employees of the U.S. Government (Fire Chiefs and Assistant Fire Chiefs) work alongside Amentum firefighters, including Fire Captains and Lieutenants. Tr. 141:9-24 (Wilson); 23:9-16 (Geary), 209:13-210:6 (Geary); GC Exhibit 5. Amentum employees are administratively managed by the as the Functional Area Manager ("FAM"), which is also referred to as the Protective Services Manager. Tr. 37:5-20 (Mulholland).

The U.S. Government provides the location and owns the equipment. It also will assume

command and control during emergency operations.

Firefighters are assigned to one of two shifts: the A shift or the B shift. Tr. 25:10-26:22 (Geary); GC Exhibit 3. They work in three- or four-day rotations, with a six-day shift every other month to ensure an equitable rotation of weekday versus weekend work. *Id.* Some employees work on a “detached” schedule (either Monday to Thursday or Tuesday to Friday). Tr. 40:9-12 (Mulholland). These schedules are called detached because they are not associated with either A shift or B Shift. *Id.*

Due to contractual minimums and the logistics involved in movement between stations, it is not unusual for manager to request a full year of vacation when personnel are moving from one shift to another or have specific leave requirements. Tr. 27:10-28:7 (Geary). Amentum also makes this request to try to ensure minimal disruptions to an employee’s plans for vacation. *Id.*

B. The Logistics Extra Duty Assignment.

The logistics extra duty assignment is not technically a “position,” although it is often referred to as such. Tr. 38:9-39:2 (Mulholland); ER Exhibit 5. Employees with this extra duty are firefighters first and foremost. Tr. 55:56:3 (Mulholland); ER Exhibit 5. The firefighter with the logistics extra duty was responsible for ordering and acquiring items, getting equipment repaired, testing items, and tracking supplies and equipment. Tr. 38:9-39:2 (Mulholland); ER Exhibit 5. It is undisputed that the logistics extra duty is not referenced anywhere in the CBA. Tr. 101:1-5 (Downs); GC Exhibit 5. Firefighters who performed this extra duty did not receive any additional compensation until Mr. Mulholland and other members of management worked with the Union and reached an agreement on June 24, 2021. ER Exhibit 6.

A principal requirement of the logistics extra duty assignment is communication with Amentum’s customer (the U.S. Government), including the Fire Chief. Tr. 148:23-150:9

(Wilson). The person performing the extra duty works closely with the Fire Chief and other employees of the Department of Defense to ensure supplies are being properly requested and purchased. *Id.* In addition, he or she attends regular staff meetings with Amentum management and the Fire Chief and is responsible to present information at each meeting. Tr. 247:6-15 (Mulholland).

C. Events Relevant to The General Counsel's Allegations That Respondent's Implementation of the Extra Duty Assignment Grievance Settlement Was Retaliation for the Grievance (Paragraphs 5 (i) and (j)(1).

1. The Logistics Extra Duty Assignment Has Been Performed by Both One and Two Employees in the Past and Has Also Been Assigned to a Shift in the Past.

Craig Cusenz ("Mr. Cusenz") worked the extra duty assignment prior to Mr. Tully and Mr. Downs. Tr. 39:17-40:8 (Mulholland). Mr. Cusenz was the only person who performed the assignment and he worked on a detached schedule. *Id.* However, this has not always been the case and there is no contractual requirement that requires the extra duty assignment to be performed by only one person and on a detached schedule. GC Exhibit 5. Indeed, Chief Wilson, who has worked at the NTTR for nearly 30 years, testified that the extra duty assignment has been performed by more than one person in the past. Tr. 142:3-21 (Wilson). Moreover, the extra duty has also been performed in the past by persons assigned to shifts rather than a detached schedule. *Id.* Chief Wilson performed the extra duty himself in 1997 for two years, and then again in 2000 or 2001. *Id.* Every time Chief Wilson performed the extra duty, he did so while assigned to a shift rather than on a detached schedule. *Id.*

2. Mr. Mulholland Selected Mr. Tully Because He Was the Most Qualified Candidate to Fill the Extra Duty Assignment.

In early 2021, Mr. Cusenz informed Amentum that he was resigning his employment during a staff meeting. Tr. 40:16-19, 247:16-21 (Mulholland). On February 3, 2021, Mr.

Mulholland sent an email to all firefighters with the intent to solicit interest in the extra duty. Tr. 247:22-248:4 (Mulholland); GC Exhibit 7. Mr. Mulholland stated “[i]f you are interested in this extra duty please send me an email stating your interest...[i]f you have any questions about these extra duties please get with me or your Capt.” GC Exhibit 7. Mr. Mulholland *did not* describe the extra duty as a position. *Id.*

Four firefighters expressed interest in the extra duty assignment: Mr. Downs, Mr. Tully, Mr. Jenkins and Mr. Nate Hull. Tr. 46:1-11. Mr. Jenkins sent a follow up email withdrawing his interest. *Id.* Mr. Hull was a lieutenant, and it was unclear whether we would be able to also take on the logistics extra duty. *Id.* Accordingly, the selection came down to Mr. Downs and Mr. Tully. *Id.*

Mr. Mulholland evaluated Mr. Downs and Mr. Tully for the extra duty assignment. GC Exhibit 8. The candidate’s ability to communicate was of particular importance to Mr. Mulholland in the selection process because the person in that role would have to communicate with vendors, other base agencies, the Fire Chief, and the Air Force Fund, among others. Tr. 248:25-252:3 (Mulholland).

The first thing Mr. Mulholland did was pull Mr. Tully’s and Mr. Downs’ certifications to make sure they met all the requirements and to note if either candidate had any specialized experience. Tr. 248:25-249:11 (Mulholland). He then spoke to several members of leadership to solicit their opinion, including Chief Wilson. Tr. 248:25-252:3 (Mulholland). Chief Wilson’s opinion of Mr. Downs was impacted by his knowledge of multiple security infractions committed by Mr. Downs and Mr. Downs’ response when Chief Wilson attempted to discuss these issues. Tr. 143:6-148:22 (Wilson). The first security incident involved Mr. Downs’ use of a government computer to visit conspiracy websites, which caused the government to take custody of that

computer's hard drive for over a year and also resulted in Mr. Downs' loss of computer access privileges. Tr. 102:22-103:25 (Downs). Mr. Downs' response when Chief Wilson discussed the first incident with him showed a lack of accountability-rather than apologize his only statement was to ask Chief Wilson when he would get his computer privileges back. Tr. 143:6-148:22 (Wilson). This response frustrated Chief Wilson because Mr. Downs did not express any concern for endangering the computer privileges of the entire department. *Id.* Mr. Downs began to ignore and avoid Chief Wilson after the first incident. *Id.* When another security incident occurred, Mr. Downs apologized to Chief Wilson but still avoided him. *Id.* Collectively, these incidents and Mr. Downs' conduct caused Chief Wilson not to trust Mr. Downs. *Id.*

Accordingly, when Mr. Mulholland asked Chief Wilson about the candidates for the extra duty assignment, Chief Wilson told Mr. Mulholland that he thought Mr. Tully had excellent communications skills and the ability to do the job, while Mr. Downs did not. Tr. 151:8-22 (Wilson). Chief Wilson mentioned Mr. Downs' security issues to Mr. Mulholland and stated Mr. Downs would walk out of the room if Chief Wilson entered it. Tr. 248:25-252:3 (Mulholland).

Mr. Mulholland asked other members of leadership to give their input on who they thought was best qualified. Tr. 210:7-211 (Geary). Mr. Geary rated Mr. Tully higher because he felt Mr. Tully was a better communicator. *Id.* Mr. Tompkins provided a rating as well. Tr. 189:10-190:22 (Tompkins). Mr. Tompkins rated Mr. Tully higher based on his interpersonal dynamics and ability to communicate. *Id.* Overall, the captains scored Mr. Tully higher than they scored Mr. Downs. Tr. 248:25-252:3 (Mulholland); GC Exhibit 8. Mr. Mulholland also scored Mr. Tully higher. *Id.* Mr. Mulholland determined that Mr. Tully was the most qualified candidate and selected him for the extra duty assignment. Tr. 48:6-9 (Mulholland). Mr. Tully began training with Mr. Cusenz. Tr. 165:5-9. (Tully).

3. Mr. Downs Filed a Grievance Regarding His Non-Selection. Amentum Settled the Grievance by Agreeing to Assign Mr. Downs to the Extra Duty. Amentum Did Not Agree to Bump Mr. Tully.

Mr. Downs filed a grievance on March 9, 2021 over his non-selection. Tr. 33:17-34:2 (Moore), 75:4-6 (Downs); GC Exhibit 6. The Company's position was that the grievance was baseless because the logistic extra duty was not a "position" as referenced in Article 20 of the CBA. GC Exhibit 10. Mr. Mulholland documented this position in an email to Ms. Moore. *Id.*

Although Mr. Mulholland believed the grievance was baseless, he nonetheless began to discuss the possibility of having two persons perform the extra duty with his leadership team. Tr. 191:6-22 (Tompkins), 211:18-213:4 (Geary). The management team considered the issues from both Mr. Downs' and Mr. Tully's perspective and discussed how they could best address the concerns for both employees if Mr. Downs' grievance went through. *Id.* Mr. Mulholland mentioned that Mr. Shakespeare, who worked B shift, could be a good resource for whomever was assigned to B shift because he (Mr. Shakespeare), had previously been the supply officer. Tr. 226:7-227:16 (Geary).

As the grievance was not resolved during the initial phase of the process, a Step 2 meeting was held on March 26, 2021. Tr. 24:3-35:3 (Moore). GC Exhibit 7. Ms. Moore and Martha Aslesen attended for the Employer. *Id.* Mr. Bradburn, the Union's business agent, attended in person. *Id.* Union stewards Roman Sturn, Mike Gutierrez, and Mr. Downs attended by phone. *Id.* Ms. Moore took notes. *Id.* Mr. Bradburn and the union stewards presented the Union's position. Tr. 302:10-17 (Moore). Ms. Moore spoke on behalf of Amentum. *Id.* The Union contended that the company should have followed Article 20 and used seniority as an overruling factor when determining who was assigned the logistics extra duty. Tr. 302:24-303:18 (Moore). The Company's position was that the extra duty was not listed in the CBA. *Id.*

Despite the differing interpretations of the CBA, the Union and the Company were able to resolve the grievance at the Step 2 meeting. Tr. 303:19-22 (Moore). The resolution of the grievance was to assign Mr. Downs to the extra duty. Tr. 54:13-55:13 (Mulholland), 303:19-22 (Moore); GC Exhibit 7.

There were no additional terms to the grievance settlement. Tr. 303:19-305:8 (Moore). The parties did not discuss bumping Mr. Tully out of the extra duty at all, let alone agree that Amentum had to bump Mr. Tully out of the extra duty assignment so that Mr. Downs would be the only employee in the role. *Id.* Indeed, Ms. Moore and Mr. Bradburn have resolved numerous grievances that involved an agreement to reinstate or transfer an employee. *Id.* In each of those instances, the issue of bumping the impacted non-grievant was discussed. *Id.*

At the conclusion of the Step 2 meeting, Ms. Moore emailed Mr. Bradburn and restated the terms of the agreement. Tr. 305:9-306:13 (Moore); ER Exhibit 9. Ms. Moore wrote “there is not an “Extra Duty Logistics” position listed in the CBA...[w]hile Article 20 applies to the listed positions in the CBA, the Company will take into consideration this article in assigning the “Logistics” task/duty/role and will assign Mr. Eric Downs to the task.” ER Exhibit 9. Ms. Moore also emailed Mr. Mulholland to inform him of the settlement. Tr. 252:20-25 (Mulholland).

4. Amentum Implements the Term of the Grievance Settlement Consistent with Operational Needs and Its Management Rights.

Mr. Mulholland and Mr. Geary discussed how to implement the grievance settlement, consistent with their earlier conversations about how to have the situation work best for both Mr. Tully and Mr. Downs. Tr. 214:7-215:3 (Geary), 253:1-254:13 (Mulholland). They discussed getting Mr. Downs trained and making sure he received as much training as possible from Mr. Tully. *Id.* Mr. Mulholland sent Ms. Moore an email on April 3, 2021, describing his plan to have Mr. Downs train with Mr. Tully for about 4 weeks, then assign each employee to a shift. ER

Exhibit 4. Mr. Mulholland stated in this email that he was leaning towards placing Mr. Downs on B shift because Mr. Shakespeare was on B shift and could help Mr. Downs if needed. *Id.*

On April 5, 2021, Mr. Mulholland held a meeting with Mr. Tully, Mr. Downs, Mr. Tompkins, and Mr. Geary. Tr. 192:4-195:3 (Tompkins), 218:1-220:2 (Geary), 258:10-23 (Mulholland). The meeting occurred in Mr. Mulholland's office. *Id.* Mr. Downs attended on the phone. *Id.* Mr. Mulholland laid out the plan going forward and stated that there would be two supply officers, and Mr. Downs would train with Mr. Tully to help get Mr. Downs up to speed. Tr. 167:8168:15 (Tully), 192:4-195:3 (Tompkins), 258:24-259:7 (Mulholland). He explained that no decision had been made yet about shift assignment, but that having one person on each shift (A and B) would help address the constant need to move things around logistically between the main stations on the weekends. Tr. 175:16-176:1 (Tully). Mr. Mulholland asked Mr. Downs to provide information relating to obtaining a Common Access Card ("CAC") and for his vacation schedule by the end of the day. Tr. 192:4-195:3 (Tompkins), 219:3-220:2 (Geary), 259:8-17 (Mulholland). Mr. Mulholland repeated that he needed the projected leave to make sure the decision of who to place on A and B shift would not disrupt someone's plans. Tr. 219:3-220:2 (Geary), 225:23-226:6 (Geary). He wanted it by the end of the day because he wanted to move forward with getting Mr. Downs rotated down to the proper station as soon as possible. Tr. 259:18-260:9 (Mulholland).

Mr. Downs did not provide his projected leave by the end of the day as Mr. Mulholland requested. Tr. 220:3-18 (Geary), 263:7-14 (Mulholland).

Leadership wanted to bring Mr. Downs to the main station to begin training immediately, but Mr. Downs was leaving for prescheduled vacation around 6:00a.m. the next day (April 6). Tr. 195:20-196:15 (Tompkins), 223:16-22 (Geary), 260:12-21 (Mulholland).

Accordingly, Mr. Mulholland and Mr. Tompkins discussed bring Mr. Downs to the station where the supply officer works upon his return from vacation on April 12, 2021. Tr. 196:20-200:21 (Tompkins). Coordinating the movement of personnel is critical to Amentum because it has minimum staffing requirements for each location under the contract. *Id.* Mr. Mulholland paged one of the union stewards, Mr. Sturn, to his office to discuss moving Mr. Downs to the station. *Id.* Mr. Sturn suggested that they ask Mr. Downs if he was still interested in the extra duty even if it was not on the detached schedule, from Monday through Thursday. *Id.* Mr. Mulholland also told Mr. Sturn that Mr. Downs had not provided his projected leave as requested. Tr. 263:15-265:3 (Mulholland). Mr. Sturn told Mr. Mulholland “just put him on B shift.” *Id.*

Upon Mr. Sturn’s suggestion, Mr. Mulholland called Mr. Downs to double-check, before he was moved, if he still wanted the extra duty. Tr. 200:13-202:16 (Tompkins), 265:4-266:12 (Mulholland). Mr. Tompkins was present in Mr. Mulholland’s office when he made the call. *Id.* Mr. Mulholland told Mr. Downs they were planning on moving his station today and that he wanted to make sure Mr. Downs still wanted the extra duty. *Id.* Mr. Downs said “yes.” *Id.* Mr. Mulholland told Mr. Downs he gave him two things to do the previous week, and that Mr. Downs had sent Mr. Mulholland his CAC information but did not send him the projected leave. *Id.* Mr. Mulholland counseled Mr. Downs on following through with tasks and emphasized that it would be especially important in his role moving forward. *Id.* Mr. Downs moved stations the afternoon of April 12, 2021. Tr. 203:6-17 (Tompkins).

Mr. Downs, Mr. Mulholland, Mr. Tully, Mr. Geary and Mr. Sturn all met in Mr. Mulholland’s office the next day, April 13, 2021. Tr. 203:18-204:23 (Tompkins), 267:10-268:13 (Mulholland). They discussed Mr. Mulholland’s expectations for Mr. Tully training Mr. Downs. *Id.* Mr. Mulholland stated he had not made a final decision but was leaning on assigning Mr.

Downs to the B shift because Mr. Downs was less experienced and could rely on Mr. Shakespeare, another B shift employee who had previously performed the role, for help if needed. *Id.* Mr. Sturn, the union steward, did not contend during this meeting that the placement of Mr. Downs and Mr. Tully on shifts rather than a detached schedule violated the grievance settlement agreement or was improper in any way. Tr. 268:14-23 (Mulholland).

Mr. Downs began to receive on the job training from Mr. Tully. Tr. 54:13-55:13 (Mulholland). At the time, neither Mr. Downs nor Mr. Tully received any type of differential or extra pay for performing the extra duty assignment. *Id.* It is undisputed that neither Mr. Downs nor the Union filed a grievance alleging that the grievance settlement was violated or even made this contention when Mr. Mulholland informed Mr. Downs of his intention to schedule him and Mr. Tully on two different shifts. Tr. 110:10-111:10 (Downs), 262:9-20 (Mulholland).

5. Amentum Executed a Memorandum of Agreement *after* Mr. Downs' Grievance and the Implementation of the Grievance Settlement, Resulting in Extra Duty Pay for Mr. Downs.

In his April 3, 2021 email to Ms. Moore, Mr. Mulholland referenced his desire to assign premium pay to the logistics duties. Tr. 254:14-255:23 (Mulholland); ER Exhibit 4. It was Mr. Mulholland's intention to negotiate with the Union to obtain premium pay for both Mr. Downs and Mr. Tully. *Id.* Mr. Mulholland drafted a document with the qualifications and requirements for the logistics extra duty in support of his efforts to obtain premium pay for the individuals performing those duties. Tr. 256:6257:4 (Mulholland); ER Exhibit 5. Amentum ultimately reached an agreement with the Union regarding premium pay for the logistics extra duty. Tr. 257:11-258:3 (Mulholland); ER Exhibit 6. The agreement was effective June 24, 2021. *Id.*

6. Mr. Tully Resigned His Employment, Leaving Mr. Downs as the Sole Employee With the Extra Duty Assignment.

Mr. Tully resigned his employment in September of 2021 and began working as a

firefighter for Mission Support Test Services. Tr. 162:3-15 (Tully). Following Mr. Tully's departure from the Company, Mr. Downs assumed sole responsibility for the extra duty assignment and works on a detached schedule. Tr. 72:6-7 (Downs).

D. Additional Facts Relevant to The General Counsel's Allegations That Respondent "Disparaged" the Union, Threatened Its Employees that It would be Futile to File Grievances, and Threatened its Employees with "Unspecified Reprisals" because They Engaged in Protected Concerted Activities (Paragraph 5(e)).

The allegations in Paragraph 5(e) of the Complaint relate to the April 5, 2021 meeting where Mr. Mulholland notified Mr. Tully and Mr. Downs of the Company's plan to have them both work the extra assignment, train together, and eventually work on separate shifts. Mr. Mulholland, Mr. Geary, Mr. Tompkins, Mr. Tully, and Mr. Downs were present at the meeting. Tr. 192:4-195:3 (Tompkins), 218:1-220:2 (Geary), 258:10-23 (Mulholland). All five men testified at the hearing. None of the witness testimony supported Mr. Downs' version of events.

Mr. Tully testified that Mr. Downs asked Mr. Mulholland "did you run this by Mikey [Mike Gutierrez, a union steward]" in reference to Mr. Mulholland's plans to have Mr. Tully and Mr. Downs perform the extra duty while assigned to a shift. Tr. 168:16-169:15 (Tully). Mr. Tully stated Mr. Mulholland responded "this is management rights I'm exercising...I don't need to run personnel decisions by the Union. This is I'm exercising my rights as a manager to do what needs to be done to make it go." *Id.* Mr. Tully took Mr. Mulholland's statements to reference management's rights under the CBA to fill personnel slots. Tr. 169:8-15 (Tully).

Mr. Tompkins¹ testified that Mr. Downs asked Mr. Mulholland if "he had run that by Mikey," who is a union steward. Tr. 192: 18-25 (Tompkins). Mr. Tompkins stated Mr. Mulholland

¹ Mr. Tompkins is an operations captain. Tr. 178:2-179:11 (Tompkins). He was previously a lieutenant, and before that, a firefighter. *Id.* When he was firefighter, he was a member of the Union and served as a union steward for 12 years. *Id.* Mr. Tompkins' testimony is particularly credible because he mentored Mr. Downs. For instance, he spoke with him on several occasions

said, “I don’t run my personnel decisions by Mikey” and said it was well within his rights to do what he was doing with the two supply officers. Tr. 192: 18-25 (Tompkins).

Moreover, Mr. Tompkins, who was a union steward for 12 years, credibly testified that Mr. Mulholland said nothing in the April 5, 2021 meeting that concerned him. Tr. 193:10-16 (Tompkins). Mr. Tompkins testified that Mr. Mulholland did *not* grow angry and ask Mr. Downs who he worked for. Tr. 194:25-18 (Tompkins). Mr. Tompkins testified Mr. Mulholland did not say “he didn’t have to tell the Union anything” and did not say anything disparaging about the Union. *Id.*

Mr. Geary testified Mr. Mulholland said he “didn’t have to run personnel changes or personnel movement by Mikey.” Tr. 223:23-224:13 (Geary). Mr. Mulholland did not grow angry or say anything about arguing semantics. *Id.*

Mr. Mulholland testified that Mr. Downs asked if he “ran that by Mikey.” Tr. 261:15-262:5 (Mulholland). Mr. Mulholland stated “I do not run our personnel decisions through Mikey; I was well within my rights to make these personnel moves.” *Id.* Mr. Mulholland did not ask Mr. Downs who he worked for. Tr. 262:21-263:1 (Mulholland). He did not tell Mr. Downs that he was not going to argue semantics. *Id.*

E. Additional Facts Relevant To The General Counsel’s Allegations That Respondent Threatened its Employees By Inviting Them to Quit and Threatened its Employees With Discharge (Paragraphs 5(f) and (g)).

The General Counsel did not produce any evidence in support of the allegation that Mr. Mulholland invited employees to quit their employment because they engaged in concerted activities (Paragraph 5(f)). Not even Mr. Downs testified that any such statement was made by

about how to advance his (Mr. Downs’) career and helped him complete his packet to apply for fill-in lieutenant duty. Tr. 180:4-181:3 (Tompkins). Mr. Tompkins also coached Mr. Downs on improving his relationship with Chief Wilson. Tr. 181:4-182:1 (Tompkins).

Mr. Mulholland on April 12, or any other date in question.

The allegations in Paragraph 5(g) appear to involve a discussion Mr. Geary and Mr. Mulholland had with Mr. Tully and Mr. Downs on April 29, 2021 regarding timecards. Tr. 231:4-237:9 (Geary), 287:14-293:2 (Mulholland). To place this discussion in context, this was not the first time Mr. Mulholland has discussed timecards and timecard fraud in the workplace. Tr. 234:3-22 (Geary), Tr. 273:19-274:11(Mulholland). Indeed, it is undisputed that management frequently raised timecards and avoiding timecard fraud as a topic of discussion in the workplace. Tr. 174:20175:8 (Tully), 229:11-23 (Geary), 270:20-271:2, 273:19-25 (Mulholland). For example, Mr. Mulholland sent an email to Mr. Tully and Mr. Downs on April 15, 2021 reminding them to keep using comments in timecards. ER Exhibit 14. He spoke to them about it several times. Tr. 270:20-271:2 (Mulholland). This was an important issue to management because the government customer has the ability to audit timecards and has done so in the past. Tr. 229:11-230:3 (Geary), 271:3-22 (Mulholland). Due to the importance of timecard accuracy, Mr. Mulholland's practice was to review timecards and remind employees that if anyone looked at a timecard 2 years from now, he or she should be able to tell why an individual's hours were entered the way they were. Tr. 272:23-273:18 (Mulholland).

An example of the importance of accurate timekeeping that is frequently discussed in the workplace involves a former employee named Steve Wynn, who was terminated in 2003 for stating he was going downtown but not properly accounting for his time. Tr. 182:16-188:17 (Tompkins). Although Mr. Wynn was terminated several years ago, the story sticks around because it is the singular glaring example of how serious of an issue timekeeping is at the workplace. Tr. 182:16-188:17 (Tompkins).

Moreover, timecard accuracy is a point of emphasis in the Company's annual Deltek

training. Deltek is the timesheet system used by Amentum to record employee hours. Tr. 182:7-15 (Tompkins), 227:22-228:4 (Geary). Employees enter their hours daily and, at the end of the week, complete the weekly sheet and sign off on it. *Id.* Employees receive annual training on Deltek to make sure they are entering their time properly. Tr. 182:16-188:17 (Tompkins), 228:5-17 (Geary); Employer Exhibit 2). Mr. Tompkins has conducted this training in the past, including the 2021 training that Mr. Downs attended. *Id.* Mr. Tompkins highlights the issues employees have most frequently, including entering notes so early departures and off-site travel is properly accounted for. *Id.* Mr. Geary has also given the training in the past. Tr. 228:7-229:10 (Geary). Mr. Geary's points of emphasis include filing out timecards correctly to avoid shorting yourself as an employee, or, on the other side of the spectrum, being held accountable for timecard fraud if the employee is not working the hours they enter. *Id.*

Consistent with these Company practices, Mr. Mulholland and Mr. Geary discussed timecards with Mr. Downs and Mr. Tully. Tr. 231:4-237:9 (Geary), 287:14-293:2 (Mulholland). The conversation started in Mr. Mulholland's office when Mr. Downs came in and asked Mr. Mulholland whether he should enter his time going downtown as a continuation or a callout. 287:14-293:2 (Mulholland). Because the information also applied to Mr. Tully, Mr. Mulholland got up and had Mr. Geary and Mr. Downs follow him to the logistics office. *Id.* They discussed how to enter Mr. Tully's and Mr. Downs' movement from the location to downtown in their timecards. Tr. 231:4-237:9 (Geary), 287:14-293:2 (Mulholland). Mr. Mulholland and Mr. Geary asked Mr. Tully and Mr. Downs to make sure they were putting comments in their timecards to explain their movement back and forth. *Id.* They raised the issue that day because one of the customers, Keith Long, had asked Mr. Geary and Mr. Mulholland why Mr. Downs and Mr. Tully were going downtown so often. *Id.* Mr. Mulholland gave Mr. Tully and Mr. Downs examples of

two or three other tasks they could accomplish downtown in addition to going to Nevada Tactical. Tr. 291:12-292:10; ER Exhibit 7. Mr. Mulholland reiterated the importance of filling out timecards correctly and stated timecard fraud and drugs were the only things he had seen people get fired for. Tr. 233:4-22 (Geary), 292:12-293:2 (Mulholland).

Again, none of the witnesses supported Mr. Downs' version of events. Mr. Geary testified that Mr. Mulholland *never* said that he was not going to authorize payment for Mr. Downs and Mr. Tully to travel downtown, or that Mr. Geary later told Mr. Downs and Mr. Tully to go ahead and enter their time. Tr. 235:21-237:5 (Geary). Mr. Geary testified he never said "especially for someone in [your] situation" to Mr. Downs. Tr. 237:6239:6 (Geary). He did not meet with Mr. Downs alone after and tell Mr. Downs that the Chief and others didn't want Mr. Downs in the positions and that, if they wanted Mr. Downs gone, they would find a way. *Id.*

Mr. Mulholland also testified he never stated he would not pay Mr. Downs and Mr. Tully for time spent traveling downtown. Tr. 293:7-19 (Mulholland). He did not instruct them not to go downtown and did not discipline them for going downtown. Tr. 293:7-21 (Mulholland).

Mr. Tully testified that Mr. Mulholland never stated he was looking to fire someone for timecard fraud. Tr. 175:9-11 (Tully).

F. Additional Facts Relevant To The General Counsel's Allegations That Respondent Issued a Verbal Counseling to the Charging Party on April 12, 2021 (Paragraph j(2)).

Around the same time as they discussed moving Mr. Downs down the main station for training with Mr. Tully in the logistic extra duty assignment, Mr. Mulholland and Mr. Geary discussed that Mr. Mulholland would give Mr. Downs a verbal counseling for not doing what he was asked (turning his projected leave). Tr. 225:2-22 (Geary). A verbal counseling is not progressive or formal discipline. Tr. 201:6-203:5 (Tompkins), 267:4-9 (Mulholland). It is

considered as a coaching conversation to correct behavior before formal discipline is imposed. Tr. 201:6-203:5 (Tompkins). Mr. Mulholland summarized the verbal counseling in email to Mr. Downs. Tr. 266:5-25 (Mulholland); GC Exhibit 11. The email was not disciplinary and was not placed in Mr. Downs' personnel file. Tr. 267:1-9 (Mulholland). There is no evidence, other than Mr. Downs' testimony, that a "write-up" was ever discussed.

WITNESS CREDIBILITY

Credibility determinations rely on a variety of factors, including the consistency of the witness' testimony, demeanor, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *See, e.g., Aliante Station Casino & Hotel*, 358 NLRB No. 153, slip. op. 79-80 (Sept. 28, 2012); *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001).

A. Eric Downs' Credibility

Here, your honor must question the credibility of a single witness: Eric Downs. Mr. Downs' testimony is critical because it is the *only* evidence introduced by the General Counsel in support of each allegation. More specifically, unless your honor credits Mr. Downs' testimony over the testimony of every other witness regarding the statements made by Mr. Mulholland and Mr. Geary, Complaint Paragraphs 5(e), 5(g), and 5(f) must be dismissed. Given that Mr. Downs himself didn't even testify consistently with the allegations in Paragraph 5(f) and 5(j) of the Complaint, the credibility of his claims in the first place is circumspect. Finally, Mr. Downs also failed to testify as to *any* alleged animus possessed by an Amentum employee—his only testimony was that Mr. Geary told him Chief Willson and the customer, i.e. employees of the U.S. Government, were not happy that Mr. Downs obtained the logistics extra duty. Tr. 91:14-92:17 (Downs). Even if your honor credited this testimony, which was not only uncorroborated but was

contradicted by the testimony of a credible witness, at best Mr. Downs' testimony was that U.S. Government employees did not like him. This says nothing of Mr. Mulholland or Mr. Geary's motives and intent.

There are several reasons why Mr. Downs' testimony should simply be thrown out. Mr. Downs admitted he had a security incident in the past involving his use of a government computer to visit conspiracy website, which caused the government to take custody of that computer's hard drive for over a year and also resulted in Mr. Down's loss of computer access privileges. Tr. 102:22-103:25 (Downs). His testimony regarding his other security violations was evasive. Initially, he denied having any other security violations. Tr. 104:4-20 (Downs). Then, he attempted to avoid the question by stating he had not "signed" for any other security violations. *Id.* However, when confronted with a specific instance when his wife publishing classified information on Facebook in 2019, he admitted that this occurred. *Id.* He then denied that during the interview about the Facebook incident, he self-disclosed another violation where he gave classified information to people while at a bar. Tr. 104:21-105:25 (Downs). He backtracked *again* in his testimony and admitted he did so, even though he had denied it only moments before. *Id.* He refused to acknowledge that the government's security concerns about him were a valid reason to not assign him an extra duty which involved computer access, while simultaneously agreeing that it was a serious issue and was a good reason for Chief Wilson and the government not to have confidence in him. Tr. 106:1-25 (Downs).

Incredibly, Mr. Down violated security protocols again at the hearing by providing and allowing a controlled document to be displayed as an exhibit, and then admitted he took no steps to ensure that removal of that email was consistent with his security obligations. Tr. 130:3-13 (Downs).

Mr. Downs' testimony mischaracterized documents. For instance, even though the text of the email seeking interest in the extra duty never referred to the extra duty assignment as a "position," Mr. Downs testified that it did even when he was shown the exhibit. Tr. 72:20-73:4 (Downs); GC Exhibit 7. He persisted in claiming that the first time he was informed it would be extra duty was April 15, despite the plain use of the term "Extra duty" in Mr. Mulholland's February 3, 2021 email. Tr. 138:24-139:3 (Downs).

Mr. Downs' claim that Mr. Muholland stated "he didn't have to tell them anything" referring to the Union during the April 5th meeting is also incredible. Tr. 80:4-7 (Downs). It is not supported by the testimony of any of the other 4 persons who were present. Neither is Mr. Downs' testimony that Mr. Mulholland grew angry and asked "who do you work for?" or Mr. Mulholland's alleged statement that "he wasn't going to argue semantics" with him. Tr. 80:14-81:3. Tr. 80:8-81:3 (Downs). On direct examination, Mr. Downs omitted that Mr. Tully was present for the meeting. Tr. 99:2-9 (Downs). On redirect, he claimed, for the first time, that Mr. Mulholland had also told Mr. Downs he could use any "legal means" he wanted to resolve the conversation if he was unhappy about it. Tr. 137:1-13 (Downs). Mr. Downs testified he understood that to mean he could contact his Union and/or file a grievance if he wanted to. Tr. 139:22-140:4 (Downs), which directly contradicts the allegation in Paragraph 5(e)(2) of the Complaint that Mr. Mulholland threatened that it would be futile to file grievances.

Mr. Downs falsely testified that a meeting occurred on April 6, 2021 between him, Mr. Mulholland, Mr. Tompkins, and Mr. Geary. Tr. 81:17-82:6 (Downs). When confronted with the time records that showed otherwise, Mr. Downs grew defensive and doubled down on the lie rather than admit he made a mistake. Tr. 126:2-127:25 (Downs). He even went so far as to claim that his time records must have been wrong and blamed the captains for not filling out *his own* timesheet

properly. *Id.* Mr. Downs' testimony was impeached by transport records that show him leaving the work location early in the morning on April 6, 2021, before any meeting could have occurred. ER Exhibit 3. It was further impeached by documentation which established that Mr. Downs signed and approved the timecard he claimed was wrong on June 28, 2021. ER Exhibit 8.²

Mr. Downs also gave contradictory testimony that, during a meeting on April 12, 2021, Mr. Mulholland stated he was going to give him a written write up for failing to send his vacation time, and then asked him if he wanted a Union representative even though Mr. Sturn, a Union representative, was already in the meeting. Tr. 84:3-87:3 (Downs). He claimed Mr. Mulholland told him he was assigning him to the B shift in part because of the alleged "write-up." *Id.* He claimed that he asked for the "write-up in writing" and then Mr. Mulholland called him back two hours later and stated he was downgrading the written warning to a verbal counseling. *Id.* This appears to nothing more than an attempt by Mr. Downs to characterize the email Mr. Mulholland sent *summarizing* the verbal counsel as a "write-up in writing."

Other examples of Mr. Downs' incredible testimony included his claim that Ms. Moore agreed that the Company violated Article 20 at the Step 2 meeting, which was flatly contradicted by Ms. Moore. Tr. 78:8-79:4 (Downs), 303:23-304:2 (Moore). He claimed that Mr. Mulholland gave him no deadline at all for turning in his vacation schedule for the remainder of the year, which was contradicted by Mr. Mulholland, Mr. Geary, and Mr. Tompkins. Tr. 82:23-83:3 (Downs) 192:4-195:3 (Tompkins), Tr. 219:3-220:2 (Geary), 259:8-17 (Mulholland). Mr. Downs denied receiving Deltek training more than once even though his name appears on the sign in sheets for the 2019 and 2021 Deltek trainings. Tr. 121:17-122:4 (Downs); ERX 2.

² There is no credible dispute regarding the authenticity of Mr. Downs' timecards. Ms. Moore testified as to Amentum's process for obtaining timecards, which are located in an area requiring a certain type of security clearance, and the reasons why various versions of the April 6 timecard were presented throughout the hearing. Tr. 301:8-302:1 (Moore).

Given Mr. Downs' falsifications, evasions, and demonstrated lack of trustworthiness, your honor should not take the leap of faith required to credit his testimony (and the General Counsel's speculation that Amentum's implementation of the grievance settlement was in retaliation for the settlement itself).

B. Downs' Lack of Credibility, and the General Counsel's Failure to Introduce Any Other Evidence Corroborating His Claims Despite Having Access to Union Stewards and Other Witnesses Present When Every Alleged Unlawful Statement Was Made, Weighs Heavily Against Any Finding That the General Counsel Met Her Burden Of Proof.

The General Counsel introduced virtually no affirmative evidence beyond the testimony of Mr. Downs. His claims that certain statements were made were not corroborated by any other witnesses or documents. With respect to the alleged unlawful statements, his testimony is the *only* evidence in the record which supports the General Counsel's case. It is the only "evidence" on which the General Counsel relies for her speculation that Amentum's implementation of the grievance settlement was motivated by a retaliatory animus rather than operations needs and its desires to be fair to both Mr. Tully and Mr. Downs. This absence of corroboration has a tremendous impact on the strength of the General Counsel's case. Indeed, even if Mr. Downs' obvious perjury is not taken into account, the Board has noted that the General Counsel's failure to corroborate isolated witness testimony is sufficient, on its own, to find that the General Counsel did not meet her burden of proof. *See, e.g., Precoat Metals*, 341 NLRB 1137, 1150 (2004) ("absence of corroboration is a factor, in some instances a most persuasive one, for determining whether testimony should or should not be credited.") (*citing SCA Services of Georgia*, 275 NLRB 830, 832-833 (1985)); *see also W. Irving Die Casting of Ky.*, 346 NLRB 349, 352 (2006) (*citing C&S Distributors*, 321 NLRB 404, fn. 2 (1996)) (holding that the General Counsel's failure to call available percipient witnesses weighed against a finding that the General Counsel had met his

burden).

The lack of evidence has a profound impact in this case with respect to the allegation in Paragraphs 5(i) and 5(j)(2) of the Complaint. Specifically, Chief Wilson's testimony, which was based on his nearly 30 years of experience at the NTTR, established that the logistics extra duty position, established that there was no mandate or established practice that the extra duty be performed by only one person on a detached schedule. Tr. 142:3-21 (Wilson). This destroys the General Counsel's inference that Amentum's decision to have both Mr. Tully and Mr. Downs work the role while assigned to shifts was somehow retaliatory.

ARGUMENT

The General Counsel bears the burden of establishing each element of its contentions that Amentum violated the Act. *See, e.g., KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975). That "burden never shifts, and ... the discrediting of any of Respondent's evidence does not, without more, constitute affirmative evidence capable of sustaining or supporting the General Counsel's obligation to prove his case." *Id.*; *see also NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966) ("The mere disbelief of testimony establishes nothing."). As set forth below, the General Counsel did not meet her burden.

A. Amentum Did Not Violate The Act When It Implemented the Grievance Settlement.

The General Counsel contends that Amentum's implementation of the grievance settlement was retaliation for the grievance itself. Specifically, the General Counsel alleges Amentum's decision to have both Mr. Tully and Mr. Downs perform the extra duty assignment on separate shifts rather than have one employee perform the task on a detached schedule was retaliatory. This theory is circumspect on its face. It fails as a matter of law when subject to further analysis.

In mixed motive cases, where an employer's motives may be a mix of legitimate and discriminatory reasons, the Board applies the burden shifting analysis set forth in *Wright Line*. *Medeco Security Locks, Inc., v. NLRB*, 142 F.3d 733, 741 (4th Cir. 1998) (citing *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)). Under *Wright Line*, the General Counsel must prove by a preponderance of the evidence that the employee's protected activity was a motivating factor for the employer's actions. *Shearer's Foods, Inc.*, 340 10 NLRB 1093, 1094 (2003). The elements required to support such a showing are union or protected concerted activity, the employer's knowledge of that activity, and animus against the employee's protected conduct. *Id.*

Here, the General Counsel's theory is inconsistent with the sequence of events and precludes the General Counsel from establishing even a *prima facie* case. As set forth above, the only protected activity in which Downs allegedly engaged before Amentum and the Union agreed to settle the grievance was filing the grievance itself. It defies reason to believe that the settlement of that grievance and the implementation of that settlement could be based on anything other than the supposed protected concerted activity which occurred *before* the settlement, just as it defies reason that the Employer could have violated the Act by settling that grievance and implementing that settlement with the Union's knowledge and consent. The Employer was unable to find any authority, Board or otherwise, suggesting that a negotiated settlement can be an adverse act for purposes of a motive-based violation of Section 8(a)(1) and (3) of the Act.

The other alleged actions as described in Paragraph 5(d) of the Complaint, amount to complaints about the terms of the settlement itself. Complaints about a grievance settlement might warrant filing a charge against Teamsters 631 or an internal union complaint, but those complaints

do not concern his terms and conditions of employment, and in any event, are so highly individualized that they cannot constitute protected concerted activity under the Act. “[M]ere griping” without the intent to engage in further group action is not protected by the Act. *Mushroom Transportation Co., Inc. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *see also Atlantic Pacific Construction Company, Inc. v. NLRB*, 52 F.3d 260, 262 (9th Cir. 1995); *The Hoytuck Corp.*, 285 NLRB 904, n.3 (1987); *Royal Development Co., Ltd. v. NLRB*, 703 F.2d 363, 374 (9th Cir. 1983) (concerted protected activity distinguished from an employee acting for himself and by himself).

Assuming that Mr. Downs’ actions were protected union activity, the General Counsel has failed to show that Amentum’s actions were motivated by animus against the Union or Mr. Downs’ protected conduct. Indeed, there simply is no underlying proof of animus. Other than Mr. Downs’ uncorroborated and contradicted testimony that Mr. Mulholland “grew angry” in one meeting and that Mr. Geary told him U.S. Government employees weren’t happy that he had received the logistics extra duty, there is nothing to suggest that the displeasure of any *Amentum employee* was the motivating factor behind the operational decision to have Mr. Tully and Mr. Downs both work the extra duty assignment and do so on separate shifts. Even if Mr. Downs’ testimony regarding his conversation with Mr. Geary could be credited, the General Counsel provided no evidence to link the alleged animus of the U.S. Government employees to Amentum’s actions. The General Counsel had ample opportunity to examine and cross-examine the Fire Chief, Mr. Wilson, and members of Amentum’s management regarding any animus, including Mr. Geary, Mr. Tompkins, and Mr. Mulholland. No such evidence was solicited.

Instead, to the contrary, the evidence proves that Mr. Downs was treated fairly. Amentum began implementing the grievance settlement immediately. There is no evidence that anyone at Amentum obstructed Mr. Downs’ transition to the extra duty assignment. Amentum ensured that

Mr. Downs would begin training for the extra duty assignment as soon as possible in order to maximize the time Mr. Downs could work with and learn from Mr. Tully. No one delayed or dragged out the training process. Mr. Downs was set up to succeed in his new role.

Moreover, as to the decision to assign Mr. Downs to B shift rather than A shift, Mr. Mulholland's testimony that Mr. Sturn, a union steward, suggested that Mr. Mulholland do so was not rebutted. There can be no retaliatory animus when Mr. Mulholland's decision was condoned by union leadership. It is also undisputed that Mr. Tully had more experience in the role than Mr. Downs, and that by assigning Mr. Downs to the B shift, it ensured he would have access to Mr. Shakespeare, an employee who had performed the role previously, as a resource.

Finally, two critical, undisputed facts vitiate the General Counsel's theory that Amentum's operational decisions were motivated by retaliatory animus. First, it is undisputed that Mr. Mulholland corrected Mr. Downs' April 29, 2021 timecard to ensure Mr. Downs was paid for 12 hours of work, rather than the 10 hours Mr. Downs had originally entered. Second, it is undisputed that, after the grievance settlement, and after Mr. Downs began working in the extra duty assignment, Mr. Mulholland worked to obtain premium pay for Mr. Downs and Mr. Tully. Mr. Mulholland documented the responsibilities of the extra duty in support of this pursuit. ER Exhibit 5. He assisted with the negotiation of the Memorandum of Agreement with the Union which amended the parties' CBA to provide premium pay for all hours worked in the role. ER Exhibit 6. Mr. Downs began earning more money effective July 5, 2021. Mr. Tully and Mr. Downs were the first firefighters to receive premium pay. Mr. Mulholland's efforts to secure more pay for Mr. Downs are entirely inconsistent with a retaliatory animus.

There is also no evidence of pretext. The "crucial factor is not whether the business reasons cited by [Amentum] were good or bad, but whether they were honestly invoked and were, in fact,

the cause” of Kendigelen’s investigation. *Healthcare Emples. Union, Local 399 v. NLRB*, 463 F.3d 909, 921-922 (9th Cir. 2006) (quoting *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964)). The General Counsel presented no evidence that Amentum’s cited reasons for have both Mr. Tully and Mr. Downs work the logistics extra duty, with one assigned to each of the two shifts, were anything but honest. Mr. Mulholland began to discuss with his leadership team the possibility of having two firefighters in the role *before*³ the grievance was resolved. They wanted to find a solution that was best for Mr. Tully, Mr. Downs, and operations at the work location. Having two employees perform the extra duty meant that someone would always be available to do the work seven days a week, instead of just during weekdays.

Amentum’s actions throughout the relevant events detailed above constituted a reasonable and sound exercise of its management rights. At every step of the way, the primary considerations were fairness to Mr. Tully and Mr. Downs, maximizing training time to ensure both men succeeded in their roles, and operational efficiency. Paragraphs 5 (i) and (j)(1) of the Complaint must be dismissed.

B. The General Counsel Failed to Establish that Amentum Made Any Unlawful Statements.

The General Counsel’s 8(a)(1) threat allegations are equally meritless. Preliminarily, as addressed above, the allegations rely solely on the testimony of Mr. Downs, which was highly suspect and should be given no weight whatsoever. Other than Mr. Downs, four witnesses testified about the statements made on April 5, 2021, and April 29, 2021.⁴ None of the four witnesses

³ The timeline of events also demonstrates a lack of retaliatory animus. It is undisputed that Mr. Mulholland discussed the possibility of having two men work the role on separate shifts before Mr. Downs’ grievance was resolved. Under these circumstances, there can be no credible finding that Mr. Mulholland concocted the plan to spite Mr. Downs after learning of the grievance settlement.

⁴ Although Paragraph 5(f) of the Complaint alleges a statement was made on April 12, 2021 by Mr. Mulholland inviting employees to quit their employment, there was no testimony related to this allegation, even from Mr. Downs. Dismissal of this allegation is required.

corroborated Mr. Downs' version of events. In fact, every witness contradicted Mr. Downs regarding the alleged statements.

As to the April 5, 2021 meeting, Mr. Tompkins, Mr. Geary, Mr. Tully, and Mr. Mulholland all credibly testified that Mr. Mulholland said something to the effect that he did not need to run his personnel decisions by Mikey (a union steward) and was well within his rights to assign Mr. Tully and Mr. Downs to separate shifts. First, there is nothing inherently disparaging about this statement, which was nothing more than an assertion of Mr. Mulholland's ability to assign employees to shifts pursuant to Amentum's management rights. Second, this was a truthful statement, which is demonstrated by the Union's acquiescence and even collaboration with the union steward, Mr. Sturn, in making the final determination as to shift assignments. Truthful statements such as these do not violate the Act. *See, e.g., Proctor & Gamble Mfg. Co.*, 160 NLRB 334 (1966). Employers have a "fundamental right, protected by Section 8(c) of the Act, to communicate with its employees." *United Technologies Corp.*, 274 NLRB 1069, 1073-74 (1985); *see also NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121 (2d Cir. 1986) (employer did not violate the Act when criticizing union's proposals as "thoughtless and irresponsible").

The remainder of Mr. Down's allegations regarding the April 5, 2021 meeting are likewise insufficient to establish a violation of the Act. The other witnesses denied that Mr. Mulholland grew angry, asked Mr. Downs who he worked for, stated he was not going to argue semantics, and stated that Mr. Downs could use whatever legal means necessary if he was unhappy with the decision. While all of Amentum's witnesses were credible, as was Mr. Tully's, particular weight should be given to Mr. Tompkins' testimony. Mr. Tompkins was a union steward for 12 years. He testified that Mr. Mulholland said nothing in the April 5, 2021 meeting that concerned him. Tr. 193:10-16.

Mr. Downs' claims that Mr. Mulholland threatened to not pay him and Mr. Tully for going downtown on April 29, 2021, and stated he was looking to fire someone for timecard fraud are simply incredible and must be rejected. First, it is undisputed that Mr. Mulholland corrected Mr. Downs' timecard to *pay him for more hours* on April 29, 2021. Mr. Mulholland's correction of Mr. Downs' timecard undermines Mr. Downs' claim that he stated he would not pay Mr. Downs at all. Second, Mr. Mulholland and Mr. Geary both denied that Mr. Mulholland threatened to not pay or to fire anyone. They both credibly testified that Mr. Mulholland mentioned timecard fraud and drugs as the only thing he had seen employees get fired for. Third, the General Counsel failed to solicit any evidence from Mr. Tully that corroborated Mr. Downs' testimony. Accordingly, an adverse inference⁵ is warranted that Mr. Tully would have testified, if asked, that Mr. Mulholland and Mr. Geary did not make the statements Mr. Downs attempted to attribute to them. Finally, the frequency and manner in which timecards were discussed in the workplace weighs against a finding that any threat was made. The importance of keeping accurate timecards was a frequent topic of conversation in the workplace. All employees received annual training on the topic. Mr. Mulholland discussed the issue with Mr. Tully and Mr. Downs several times. He sent an email reminding them of proper practices. Under the totality of the circumstances, the so-called "threats," as we understand them, cannot reasonably be interpreted as a threat, regardless of the actual effect the statements may have had on employees who claimed to have heard them. *See, e.g., Smithers Tire*, 308 NLRB 72 (1992).

⁵ The judge may weigh the General Counsel's failure to call an identified, potentially corroborating bystander as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. *C & S Distributors*, 321 NLRB 404 n. 2 (1996), citing *Queen of the Valley Hospital*, 316 NLRB 721 n. 1 (1995). Accord: *Stabilus, Inc.*, 355 NLRB 836, 840 n. 19 (2010).

Credible witness testimony establishes that Mr. Mulholland gave timecard fraud and drugs as examples of the only type of misconduct he had seen employees be terminated for in the past. This statement does not constitute a “threat” under section 8(a)(1) of the Act. It is inapposite of such cases, where the employee is *directly* threatened with discharge and the discharge is expressly linked to protected activities. *See, e.g., Pratt (Corrugated Logistics), LLC and Teamsters Local 773*, 360 NLRB 304 (2014) (violation found where employee warned not to get involved with the Union, stating that another employee had been fired for that reason).

C. Mr. Downs’ Receipt of a Verbal Counseling Did Not Violate the Act.

To establish unlawful discipline under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee was subjected to an adverse employment action. The General Counsel did not satisfy that burden in this case.

Article 17 of the CBA sets forth the limits of Amentum’s ability to impose written discipline in the form of disciplinary letters. GC Exhibit 5, p. 19. There is no evidence that Amentum issued a disciplinary letter to Mr. Downs. In fact, all of the witnesses agreed that Mr. Downs received a verbal counseling, and this is corroborated by Mr. Mulholland’s email summarized the verbal counseling he delivered on April 12, 2021. The witness testimony is undisputed—a verbal counseling is not considered to be an adverse action by Amentum. It is merely a coaching. It does not constitute progressive discipline under the CBA. It has no impact on the terms and conditions of employment. For these reasons, verbal counseling are not tracked or retained in any way. They do not appear in employee personnel files.

Mr. Downs’ treatment was consistent with these policies. His receipt of a verbal counseling had no impact on his employment. It was not considered disciplinary under the collective bargaining agreement which governs the terms and conditions of his employment. It

was not tracked as discipline by management. The summary email written by Mr. Mulholland was not placed in his personnel file.

The Board has repeatedly held that actions like the verbal counseling received by Mr. Downs, which neither constitute formal progressive discipline, nor lay “a foundation for future disciplinary action against [the employee],” do not constitute an adverse action for purposes of establishing a violation of the Act. *Promedica Health Systems Inc.*, 343 NLRB 1351, 1351-1352 (2004) (quoting *Trover Clinic*, 280 NLRB 6, 16 (1986)). For example, in *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993), the Board found that an employer did not violate Section 8(a)(3) by issuing a “conference report” to an employee for wearing a union pin, because there was no evidence that the conference report was “even a preliminary step in the progressive disciplinary system.” *Id.* at 403. The Board found no violation because “the General Counsel has failed to prove that the conference report is part of the Respondent’s formal disciplinary procedure or that it is even a preliminary step in the progressive disciplinary system.” *Id.*; see also *Veolia Transp. Servs.*, 363 NLRB No. 98 (Jan. 20, 2016) (coaching and counseling do not constitute discipline because, in part, it is not considered discipline under the applicable collective bargaining agreement); see also *Alan Ritchey*, 359 NLRB No. 40 (2012) (holding that suspension pending investigations do not have a material impact on employment and therefore do not constitute a change in the terms and conditions of employment which requires bargaining).

The Board has also found that actions that go beyond the verbal counseling at issue here do not constitute discipline in another context: the cases in which the Board considers whether an employee is a supervisor within the meaning of Section 2(11) of the Act. See *Jochims*, 480 F.3d at 1170-1171 (collecting authority in the supervisor context and explaining that even written warnings placed into personnel files may not constitute discipline); *735 Putnam Pike Operations*,

LLC v. NLRB, 474 Fed. Appx. 782, 783 (D.C. Cir. 2012) (write-ups which do not constitute “final and authoritative disciplinary actions” because they have “no negative effects on the reviewed employees’ job status or pay” do not constitute discipline); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 306-309 (6th Cir. 2012) (a charge nurse’s ability to impose corrective counseling did not constitute discipline because it was not considered discipline under the applicable collective bargaining agreement).

Finally, federal circuit and district courts have repeatedly held that actions like the verbal counseling issued in this case do not constitute an adverse employment action for purposes of federal anti-discrimination laws. *See Stewart v. Evans*, 348 U.S. App. D.C. 382, 275 F.3d 1126, 1134 (D.C. Cir. 2002) (“to establish an adverse personnel action in the absence of diminution of pay or benefits, plaintiff must show an action with materially adverse consequences affecting the terms, conditions, or privileges of employment.”); *Jones v. SEPTA*, 796 F.3d 323, 326 (3d Cir. 2015) (“A paid suspension pending an investigation of an employee’s alleged wrongdoing does not fall under any of the forms of adverse action mentioned by Title VII’s substantive provision.”); *see also Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006) (“[A]dministrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action.”); *Singletary v. Mo. Dep’t of Corr.*, 423 F.3d 886, 891-92 (8th Cir. 2005); *Von Gunten v. Maryland*, 243 F.3d 858,869 (4th Cir. 2001) (holding that “placing [an employee] on administrative leave with pay for a short time to allow investigation” is not an adverse action for retaliation purposes), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006); *Breaux v. City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000) (placement on paid administrative leave is not an adverse action for purposes of a First Amendment retaliation claim); *Doe v. Gates*, 828 F. Supp. 2d 266, 270-271

(D.D.C. 2011) (“Although adverse employment actions “are not confined to hirings, firings, promotions, or other discrete incidents,” *Holcomb v. Powell*, 433 F.3d 889, 902, 369 U.S. App. D.C. 122 (D.C. Cir. 2006), to establish an adverse employment action in a discrimination case, “a plaintiff must show ‘materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment such that a trier of fact could find objectively tangible harm.’”).

The evidence and authority are overwhelming—a verbal counseling does not constitute an adverse action under the Act. Moreover, as detailed above, there is no evidence that the issuance of the verbal counseling to Mr. Downs was motivated by a retaliatory or otherwise unlawful animus. Accordingly, Paragraph 5(j)(2) of the Complaint must be dismissed.

CONCLUSION

For the foregoing reasons, the General Counsel has failed to establish a violation of the Act. The Complaint should be dismissed in its entirety.

DATED: May 11, 2022

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

AMENTUM SERVICES, INC.,

Respondent.

and

ERIC DOWNS,

Charging Party.

Case No. 28-CA-276524

CERTIFICATE OF SERVICE

In addition to filing this Post Hearing Brief via the NLRB's electronic filing system, we hereby certify that copies have been served this 11th day of May, 2022, by e-mail upon:

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